

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in June 2013

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Gross Misconduct; Vulgar Comments; Threatening Behavior; Anger Issues; Hostile Work Environment

CASE STYLE: Jolliffe v. West Virginia University
DOCKET NO. 2013-0970-WVU (6/25/2013)

PRIMARY ISSUES: Whether Grievant's actions were in violation of Respondent's applicable policy on discipline, created a miserable work environment for co-workers and were grounds for termination.

SUMMARY: Grievant was employed as a Trades Specialist II in the Facilities Management at West Virginia University. Grievant's employment was terminated for acts of gross misconduct occurring on two separate dates. Grievant refused to adhere to repeated directives from his supervisor and made matters worse when he threatened bodily harm to his supervisor. Grievant once again committed gross misconduct a few days later when he made profane comments to a co-worker, assaulted him, and topped things off by kicking a chair across the room.

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COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Inappropriate Interactions with Students; Inappropriate Touching; Cruelty; Unsatisfactory Performance; Horseplay; Insubordination; Willful Neglect of Duty; Poor Judgment
<u>CASE STYLE:</u>	<u>Morris v. Harrison County Board of Education</u> DOCKET NO. 2012-1498-CONS (6/13/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved the charges against Grievant and that they constituted cruelty, insubordination, and wilful neglect of duty.
<u>SUMMARY:</u>	Grievant was suspended for 24 days without pay for placing his hands on a student's neck and shoulders on February 24, 2012, in an attempt to massage her neck after she said it hurt, and for tickling children and letting them tickle him around the mid-section, and pulling a child toward him to give her a big hug. Respondent proved that Grievant engaged in these actions, that the actions constituted inappropriate behavior, and that the actions were not simply unsatisfactory performance.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Medical Leave of Absence; Physical Requirements; Incompetency; Job Duties; Physical Agility Test
<u>CASE STYLE:</u>	<u>Holden v. Lewis County Board of Education/ AND</u> DOCKET NO. 2013-0730-LewED (6/6/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent discriminated against Grievant or acted arbitrarily or capriciously by dismissing him because he could not meet the minimum standards for a bus operator.
<u>SUMMARY:</u>	Grievant, a bus operator, attempted to return to work after a two year medical leave of absence. Grievant had gained weight while recuperating from his medical condition, and Respondent was concerned about whether Grievant could safely perform the duties of his position. Respondent requested assistance from the State Department of Education, which advised that the bus operator physical performance or physical agility test could be administered to determine whether Grievant was physically capable of safely operating a bus. This test was developed to assure that new bus operators can safely perform the duties of the position. The test was administered to Grievant by a bus inspector employed by the State Department of Education, and Grievant was unable to pass the very first requirement on the test, which was going up and down the bus steps 3 times in 30 seconds. The reason this is part of the test is that a bus operator must be able to help the children get off the bus quickly in an emergency. Respondent dismissed Grievant from his employment because he could not safely perform the duties of his position, which include assisting children in getting off the bus in an emergency. Grievant's claim that he should have been granted medical leave of absence was not timely filed.

<u>KEYWORDS:</u>	Extracurricular Assignments; Supplemental Run; Like Assignments And Duties; Supplemental Contract; Compensation; Relief; Back Pay
<u>CASE STYLE:</u>	<u>Clark, et al. v. Putnam County Board of Education</u> DOCKET NO. 2012-0944-CONS (6/28/2013)
<u>PRIMARY ISSUES:</u>	Define remedies for lost wages involving school service personnel
<u>SUMMARY:</u>	<p>Grievants contend that, in addition to the relief received at Level One in the form of back pay for the 2011-2012 school year, they should also receive back pay into the 2010-2011 school year for one year prior to the filing of their grievances, as well as statutory interest on all back pay, and a 200-day contract of employment. Two Grievants contend that the supplemental runs they drove likewise make them similarly situated to the prevailing Lanham grievants, or, in the case of one Grievant, that she was entitled to a supplemental run that would have qualified her for similar relief.</p> <p>Grievant Davis' employment situation in regard to her extracurricular assignments was not the same as the other prevailing Grievants so that she did not establish an entitlement to additional back pay. None of the Grievants established an entitlement to a regular 200-day contract covering these "as needed" extracurricular bus runs. Further, Grievant Lett failed to establish that her employment circumstances made her similarly situated to the prevailing grievants in the Lanham decision, and PCBOE established that Grievant Melton did not timely challenge an earlier employment decision that could have arguably placed her in a position where she would have become eligible for some relief. Grievants who prevailed at Level One are entitled to prejudgment statutory interest, and to back pay for up to one year prior to filing their grievances.</p>

<u>KEYWORDS:</u>	Selection; Arbitrary and Capricious; Qualifications; Experience; Competency Test
<u>CASE STYLE:</u>	<u>Terry v. Mercer County Board of Education</u> DOCKET NO. 2012-0641-MerED (6/25/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant should have been selected for the position of Accountant III over the successful candidate.
<u>SUMMARY:</u>	<p>Respondent posted an opening for an Accountant III position for its central office. In addition to passing the state Accountant competency test, Respondent added the requirement of “six hours of college courses in Principles of Accounting or job related experience” to the minimum qualifications for the position. Grievant, who was already employed by Respondent, applied for an Accountant III position. There were six applicants for the position. Someone in Respondent’s personnel office reviewed the applications and determined that only four of the applicants met the minimum qualifications. Grievant was not one of them. Respondent interviewed only the four deemed qualified. None of the four were employed by Respondent at the time. From the four applicants interviewed, Respondent determined the person most qualified to fill the position. Respondent then gave only that one applicant the state Accountant competency test. That applicant passed the test and was awarded the position. Grievant asserts that she was qualified for the position and should have been selected over the successful applicant. Respondent denies Grievant’s claims and argues that its selection was proper.</p>

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Untimely Filed; Time Limits; Job Abandonment
<u>CASE STYLE:</u>	<u>Webb v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2013-0319-DHHR (6/3/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant's Level Three appeal was untimely.
<u>SUMMARY:</u>	The record of this matter demonstrates that Grievant failed to file a grievance within fifteen days following the occurrence of the event upon which the grievance is based.

<u>KEYWORDS:</u>	Hostile Work Environment; Discrimination; Unprofessional Conduct; Progressive Discipline
<u>CASE STYLE:</u>	<u>Steele v. Regional Jail and Correctional Facility Authority/South Central Regional Jail</u> DOCKET NO. 2013-0037-MAPS (6/5/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent established that Grievant's conduct was in violation of applicable prohibited Workplace Harassment Policy.
<u>SUMMARY:</u>	<p>Respondent terminated Grievant's employment as a correctional officer at South Central Regional Jail. Grievant was classified as a Corporal, a supervisory position. Grievant contends the termination is improper and offers several arguments in support of her contention. Respondent maintains it disciplinary action is lawful.</p> <p>Grievant was discharged for violating applicable Non-Discriminatory Workplace Harassment Policy. Although Grievant denies the allegations, and provides some counter balance to aspects of the allegations, Respondent established the charges by the weight of credible evidence. Grievant engaged in conduct which created a hostile work environment for an identified correctional officer. Grievant failed to demonstrate that termination was too severe a punishment, or that mitigation was warranted under the circumstances. Grievance denied.</p>

KEYWORDS: Insubordination; Misconduct; Misappropriation; Hearsay; Mitigation of Damages

CASE STYLE: King v. Department of Health and Human Resources/Jackie Withrow Hospital
DOCKET NO. 2013-0067-DHHR (6/13/2013)

PRIMARY ISSUES: Whether Grievant was wrongfully dismissed for alleged misappropriation of resident property and insubordination.

SUMMARY: Grievant, a housekeeper with almost nineteen years of service at a long-term care facility was terminated for misappropriation of resident property and insubordination in an incident involving his removal of six houseplants from a deceased resident's room. Grievant did not misappropriate resident property as the weight of evidence shows the resident consented to the removal of the plants when she stated she wanted Grievant to have the plants upon her death. Grievant also did not violate hospital policy or procedure in removing the plants when no policy was provided governing the receipt of gifts from a resident is in place and when a supervisor's frustrated statement led Grievant to plausibly believe he had permission to remove the plants. Grievant was not insubordinate in that his supervisor's order was for him to stay out of the resident's room with no mention of the plants, and Grievant had already removed the plants.

KEYWORDS: Physical Abuse; Neglect; Physical Restraint; Gross Misconduct; Policy Violations; Progressive Discipline

CASE STYLE: Wilson v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2012-1269-DHHR (6/7/2013)

PRIMARY ISSUES: Whether Respondent abused its discretion in not instituting lower levels of punishment available.

SUMMARY: Grievant was charged with failure to adhere to hospital policies while performing her duties as a Licensed Practice Nurse at Respondent Mildred Mitchell-Bateman Hospital. Respondent met its burden of proof demonstrated by a preponderance of the evidence that Grievant's discharge was for good cause.

KEYWORDS: Probationary Employee; Discrimination; Insulting Statements; Non-Discriminatory Hostile Work Environment; Misconduct; Unsatisfactory Work Performance

CASE STYLE: Queen v. Regional Jail and Correctional Facility Authority/South Central Regional Jail
DOCKET NO. 2013-0038-MAPS (6/5/2013)

PRIMARY ISSUES: Whether Respondent's action of not retaining Grievant's services was lawful.

SUMMARY: Grievant was a probationary Correctional Officer employed at the South Central Regional Jail. Respondent terminated Grievant's employment for misconduct during the prescribed period of probationary employment. Respondent alleges violations of the West Virginia Division of Personnel's Policy on Non-Discriminatory Workplace Harassment and the West Virginia Regional Jail & Correctional Facility Authority Code of Conduct Policy No. 3010. Respondent established that Grievant engaged in a pattern of conduct which assisted to create a hostile work environment for an identified female co-worker. Grievance denied.

KEYWORDS: Probationary Employee; Poor Work Performance; Work Standards; Final Wages Within 72 Hours; Treble Damages; Wage Payment and Collection Act

CASE STYLE: Blake v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2013-0615-DHHR (6/11/2013)

PRIMARY ISSUES: Whether Respondent violated the provisions regarding termination of probationary employees when it dismissed Grievant for unsatisfactory work performance.

SUMMARY: Grievant's probationary employment was terminated, due to Respondent's determination that his performance was unsatisfactory, specifically with regard to properly performing his duties. When a probationary employee is terminated for reasons other than discipline, it is his burden to prove his services were satisfactory. In this case, Grievant failed to meet this burden, and the evidence supported the conclusion that Grievant repeatedly failed to follow proper procedures for performing his assigned duties.

KEYWORDS: Suspension; Investigation; Bad Faith; Reprisal

CASE STYLE: Ferrell, et al. v. Regional Jail and Correctional Facility Authority/Western Regional Jail
DOCKET NO. 2013-1005-CONS (6/4/2013)

PRIMARY ISSUES: Whether Grievants' suspensions without pay violated law or policy.

SUMMARY: Grievants were suspended without pay from their positions pending Respondent's investigation into allegations made against them. Such was not a disciplinary suspension. The suspensions were initially for fifteen days, but Respondent discretionarily renewed the suspensions more than once which resulted in Grievants being suspended without pay for at least forty-five days. Grievants assert that their suspensions violated RJA policies and the Administrative Rule. Further, Grievants allege other claims against Respondent, including retaliation and bad faith. Grievants also seek a default judgment and immediate reinstatement as sanctions against Respondent for bad faith. Respondent denies all of Grievants claims, asserting that it committed no wrongdoing, and that the suspensions were proper under RJA policy. Respondent denies that it acted in bad faith and opposes the default judgment and reinstatement. Grievants proved by a preponderance of the evidence that their suspensions violated RJA policy and the Administrative Rule. Further, Grievants proved that Respondent acted in bad faith during discovery, but did not prove that Respondent suspended them in bad faith. Grievant Ferrell further proved his claim of reprisal. Therefore, this grievance is GRANTED IN PART and DENIED IN PART.

KEYWORDS: Discretionary Pay Increase; Years of Service; Classification

CASE STYLE: Miller v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2012-0692-DHHR (6/21/2013)

PRIMARY ISSUES: Whether Respondent's decision not to grant Grievant a discretionary pay raise was unreasonable or arbitrary and capricious.

SUMMARY: Grievant was denied a discretionary pay increase for internal equity. Respondent denied Grievant's request because, although Grievant was paid at least twenty percent less than the highest paid person in her unit, she did not have comparable years of state/classified service. Grievant failed to prove by a preponderance of the evidence that Respondent's decision not to grant her a discretionary pay raise was unreasonable or arbitrary and capricious.

KEYWORDS: Unacceptable Work Place Behavior; Unprofessional Conduct; Sexual Harassment; Sexual Misconduct; Sex Acts at the Workplace during Work Hours; Discrimination

CASE STYLE: H. v. Division of Rehabilitation Services
DOCKET NO. 2011-0792-DEA (6/17/2013)

PRIMARY ISSUES: Whether Respondents proved that Grievant's conduct in his office during regular work hours constituted unprofessional conduct, and whether Respondent discriminated against Grievant by dismissing his employment.

SUMMARY: Respondent dismissed Grievant for unprofessional conduct after discovering that he had engaged in oral sex with a co-worker in his office during regular work hours. Grievant asserts that he was on break when the event took place, and that it did not constitute unprofessional conduct. Grievant also argues that he was subjected to discrimination because the co-worker was not disciplined. Respondent proved that the conduct was unprofessional and that Grievant was not similarly situated to the co-worker involved in the incident.

KEYWORDS: Misconduct; Unauthorized Leave; Failure to Report; Performance of Duty; Supervising of Inmate; Disciplinary Action

CASE STYLE: Cowger v. Regional Jail and Correctional Facility Authority/Central Regional Jail
DOCKET NO. 2013-0016-MAPS (6/26/2013)

PRIMARY ISSUES: Whether Respondent meet its burden of proof with regard to the allegations of misconduct levied against Grievant.

SUMMARY: Grievant is employed as a Correctional Officer with Central Regional Jail, Respondent. Grievant was suspended for five working days without pay for allegedly improperly supervising an inmate, and two instances of unauthorized leave. Grievant contest the disciplinary action. In disciplinary grievance matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. Respondent failed to meet its burden of proof with regard to a substantial allegation of misconduct. Mitigating factor(s) found in the circumstance of this case. Accordingly, this grievance is GRANTED-IN-PART.

<u>KEYWORDS:</u>	Job Duties; Policy Directives; Mitigation
<u>CASE STYLE:</u>	<u>Smith v. Division of Corrections/Parole Services</u> DOCKET NO. 2013-0145-MAPS (6/17/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent established that Grievant failed to properly perform an essential duty of his position as require by applicable agency regulation and whether the discipline Respondent imposed was excessive for the infraction.
<u>SUMMARY:</u>	<p>Grievant was suspended for failing to request a warrant for a Parole Violator in the appropriate time-frame. Grievant is aware of his omission and acknowledges some degree of responsibility, but feels that the three day suspension without pay is too severe given the totality of circumstances surrounding the occurrence, and feels that a written reprimand would best be served in this case.</p> <p>Respondent established Grievant's misconduct by a preponderance of the evidence. Respondent has discretion in these type of situations. Respondent reduced the five-day suspension originally levied. Grievant failed to demonstrate that a three-day suspension is too severe a punishment, or that further mitigation is required under the circumstances. Grievance Denied.</p>
<u>KEYWORDS:</u>	Probationary Employment; Unapproved Absences; Leave Without Pay; Unsatisfactory Work Performance; Absenteeism
<u>CASE STYLE:</u>	<u>Siler v. Department of Veterans Assistance</u> DOCKET NO. 2013-0576-DVA (6/18/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant's work performance was satisfactory during her probationary period.
<u>SUMMARY:</u>	Grievant was dismissed from her probationary employment as a Licensed Practical Nurse at the Veterans Nursing Home because of her excessive absenteeism. It was critical for Grievant to report to work as scheduled, and Respondent determined that it could not depend on Grievant to report to work as scheduled and fulfill her duties, which placed patients at risk. Respondent took into consideration that Grievant had suffered an injury while serving in the military, but believed patient care was the paramount consideration.

KEYWORDS: Probationary Employee; Unsatisfactory Performance; Preparing Reports; Untimely Manner

CASE STYLE: Zhang v. Department of Health and Human Resources/Bureau for Public Health
DOCKET NO. 2013-0777-DHHR (6/28/2013)

PRIMARY ISSUES: Whether Grievant establish that her performance met the required standards of Respondent.

SUMMARY: On November 5, 2012, before the expiration of her six-month probationary period, Grievant's employment was terminated based upon a determination that she had not made a satisfactory adjustment to the demands of the position, and that she was not performing her duties in accordance with established standards. Grievant was not able to establish by a preponderance of the credible evidence of record that her work performance was satisfactory so as to require Respondent to continue her employment beyond her probationary period.

KEYWORDS: Job Vacancy; Classification; Temporary Upgrade; Arbitrary And Capricious

CASE STYLE: Wood v. Division of Highways
DOCKET NO. 2012-1143-DOT (6/26/2013)

PRIMARY ISSUES: Whether decision to refuse to hire Grievant based on supposed disparity in pay between Grievant and an incumbent employee, and to fill that position with another employee through a twenty-month "temporary" upgrade was arbitrary and capricious.

SUMMARY: Grievant, the sole applicant for a position was not selected despite being a well-qualified, long-term employee in good standing. Instead, Respondent filled this position under the temporary upgrade policy for twenty months. The reason Grievant was not selected for the position was because a supposed disparity in pay this would create between Grievant and an incumbent employee in the same classification. Although Respondent may properly refuse to fill a vacant position, in this instance, the position did not remain vacant as Respondent abused the temporary upgrade policy in order to install another employee in the position for twenty months.